SUPREME COURT, U. S.

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No. 73-1111

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE QUINAULT ALLOTTEES ASSOCIATION, ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App.) is reported at 485 F.2d 1391.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. The petition for a writ of certiorari was filed on January 15, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States may charge individual Indians a reasonable service charge to cover the costs of administering the sale of timber on their allotted trust lands.

537-028—74——1

STATUTES AND TREATY PROVISIONS INVOLVED

The pertinent statutes and treaty provisions are set out in the petition for a writ of certiorari at pages 2–4.

STATEMENT

This is a suit by allottees of the Quinault Reservation to recover administrative charges deducted by the United States from the sale of their timber. The Court of Claims held that the charges are valid and dismissed the complaint. The petitioners seek review in this Court.

In 1855 the United States entered into a treaty with the Quinaults, Quileutes, and related tribes, whereby the Tribes ceded their territory to the United States in return for a future reservation to be selected by the President of the United States.[1] This treaty contained provisions for future allotments of tracts of land to individual Indians under the terms set forth in the treaty with the Omahas. That treaty in turn provided that, until all restrictions were removed, allotted land would be free from "levy, sale, or forfeiture" (Pet. App. 3). The Quinault Reservation established pursuant to the treaty contained approximately 200,000 acres of land, of which 98 percent was forest.

In 1887 Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. 331, *et seq.*, which provided for the allotment of tribal land to individual Indians. These allotments were to be held by the United States in trust for the individual owners for a

[1] Treaty of 1855, 12 Stat. 971. The history summarized in this Statement is set forth in more detail in the opinion below. Pet. App. 2–8.

period of twenty-five years (a period subsequently extended indefinitely by Congress), after which the land was to be conveyed to the allottee or his heirs "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. 348.

In 1905, the United States began making allotments of timberland on the Quinault Reservation. This practice was suspended in 1912 because there was some doubt whether allotments of timberland were permissible under the General Allotment Act. In 1924, this Court ruled such allotments permissible, *United States* v. *Payne*, 264 U.S. 446, 449, and the allotment program was resumed. By 1934, when the allotment program was ended by Congress,[2] most of the reservation forest had been allotted in trust to 2,340 Indians.

Congress first authorized the commercial logging of tribal or allotted Indian lands in 1910 in an Act which has been codified as 25 U.S.C. 406.[3] In 1920, Congress authorized the Secretary of the Interior to charge "reasonable fees" for miscellaneous services rendered to Indian tribes or individual Indians, 25 U.S.C. 413.[4] In 1964, Congress amended 25 U.S.C. 406 to authorize expressly the deduction of reasonable costs for the administration of timber sales from the proceeds of such sales.

The commercial cutting of timber on the Quinault Reservation began in 1922 and has continued to the present date (Pet. App. 6–7). During this time the

[2] Indian Reorganization Act of 1934, Section 1, 48 Stat. 984, 25 U.S.C. 461.

[3] Act of June 25, 1910, Section 8, 36 Stat. 855, 857.

[4] Act of February 14, 1920, Section 1, 41 Stat. 408, 415.

Secretary of the Interior has charged a fee, usually between five and ten percent of the sale price, for the costs of administering the timber sale and related expenses (Pet. 7). It is this fee which petitioners claim is in violation of the terms of their treaty and of the General Allotment Act provision that allotments be "free of all charge or incumbrance whatsoever."

ARGUMENT

The decision of the Court of Claims is correct, and presents no question warranting review by this Court.

1. The decision below recognizes that Congress has the authority, where it sees fit, to charge Indians, who are under the protection of the United States, the reasonable costs of some of the services afforded them. Although we know of no cases on this precise issue decided by this Court, the practice of making reasonable charges for certain services rendered Indians has been in existence at least since 1920, and has been approved previously by the Court of Claims. *Choctaw Nation* v. *United States,* 91 C. Cls. 320, certiorari denied, 312 U.S. 695. The precise authority at issue here was also upheld in *United States* v. *Eastman,* 118 F. 2d 421 (C.A. 9), certiorari denied, 314 U.S. 635. We know of no cases holding to the contrary.

Although the United States provides many services for Indians free of charge, there is no requirement that all such services must be free. The Court of Claims properly held (Pet. App. 9):

> Nothing in [the General Allotment Act of 1887], however, prohibits reasonable administrative charges against the proceeds from such allotted lands while held in trust and administered by the United States. This is consistent with the law of trusts which does not require that a trustee gratuitously contribute his services, absent an express agreement to the contrary.
>
> > A trustee can properly incur expenses which are necessary or appropriate for the carrying out of the purposes of the trust. (Footnote omitted.) When such expenses are properly incurred, they should ultimately be borne by the trust estate rather than by the trustee personally. [III Scott, Trusts § 244 (3d ed. 1967); see generally *Trustees* v. *Greenough*, 105 U.S. 527, 532 (1881).]

In the present case, the United States in accordance with specific Acts of Congress (see p. 3, *supra*) charged reasonable fees [5] for some of its trust services to the petitioners. The Court of Claims properly upheld its right to do so.

2. Petitioners argue that the government's administrative charges are analogous to a tax, and as such are forbidden under the guaranty of the General Allotment Act that when the restrictions on the land are ended, the land will be conveyed to the allottee free of any charge whatsoever. They cite *Choate* v.

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[5] The reasonableness of the charges is not at issue in this appeal, but is at issue in other cases brought by the petitioners and pending in the Court of Claims. See Pet. App. 2, n. 2.

Trapp, 224 U.S. 665, and *Squire* v. *Capoeman*, 351 U.S. 1, for the proposition that the guaranty creates an immunity from taxation by the federal government, and, by analogy, an immunity from fees such as those in question here. They also argue that freedom from such charges is a property right established by their treaty which Congress cannot take away without just compensation.

Their reliance on these cases, however, is misplaced. *Choate* concerned allotments to Choctaw and Chickasaw Indians under the Curtis Act of 1898, 30 Stat. 495. That Act provided that the allotments were to be held in trust by the United States and were to be nontaxable for 21 years from the date of allotment. 30 Stat. 507. A later Congress removed the restrictions on the land and provided that the land would henceforth be subject to taxation. This Court held that the provision for tax exemption, which was part of the bargain under which individual Indians gave up their interest in tribal lands in return for allotments, was a "vested property right which could not be abrogated by statute." 224 U.S. at 678–679.

Here the treaty provides that the allotted land shall be free from "levy, sale, or forfeiture" and the statutory language provides that at the expiration of the government trust the United States will convey the land to the allottee "free of all charge or incumbrance whatsoever * * *" (Pet. App. 3, 5). Those requirements are not violated by the government's requiring a reasonable charge for service rendered in connection with the sale of timber on the land—a charge that creates no lien or encumbrance on the land and which does

not inhibit the return of the land to the allottee free and clear at the end of the trust period.

In *Squire* v. *Capoeman, supra,* this Court held that the government's statutory duty to return lands to Indian allottees free of any lien or encumbrance evidenced a congressional intent that the land not be taxed pending such return—an intent which made inapplicable the general provisions of the Internal Revenue Code which would otherwise have applied to the profits from a sale of timber. This holding was specifically based on the Court's interpretation of the intent of Congress in enacting the relevant provisions of the Internal Revenue Code. 351 U.S. at 8–9.

In the present case, on the other hand, Congress has specifically authorized the charging of the administrative expenses in question. Moreover, no tax is involved. The United States is simply charging a fee for a service actually rendered—a fee to cover costs incurred whenever timber is properly managed, cut, and sold, whether the land is under federal trusteeship or not. Since petitioners' case is based on the alleged impermissibility, of charging any fee at all for these services and not on an allegation that the charges are unreasonable or go beyond recoupment of actual expenses, the Court of Claims correctly dismissed the petition.[6]

[6] Since the fees are assessed under specific congressional authorization and there is no allegation that they go beyond the benefits bestowed, there is no conflict between the decision of the Court of Claims and this Court's recent decisions in *Federal Power Commission* v. *New England Power Co., et al.*, No. 72–1162, and *National Cable Television Assn, Inc.* v. *United States*, No. 72–948, decided March 4, 1974. See *National Cable, supra*, slip. op. at 4–5.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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